FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 39.

BROOKLYN EASTERN DISTRICT TERMINAL,

Petitioner,

—against—

UNITED STATES OF AMERICA, on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

REPLY BRIEF FOR PETITIONER.

OSCAR R. HOUSTON,
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The petitioner did incur expense to replace the service of the "Integrity" and the fact that the major part of this expense, consisting of the cost of acquiring and maintaining more tugboats than required at full capacity for petitioner's business and thereby maintaining spare or reserve capacity, was incurred prior to the accident, does not justify the contention that the petitioner has suffered no loss, or that the substituted service supplied by petitioner was of no value. The case is squarely within the authority of the spare boat cases and petitioner is entitled to an award based on the market value of the substituted service... 1-7

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REPLY BRIEF FOR PETITIONER.

In the brief for the United States an attempt is made to distinguish this case from those involving "spare boat" doctrine, because it is said that

> "in those cases decision went upon the ground that the vessel owner, having incurred expense in maintaining an extra boat to handle his work when boats regularly employed were laid up for repairs, was entitled to recover damages for demurrage while the spare boat was used to replace the injured vessel. In the instant case the petitioner did not maintain a spare boat or incur any expense to replace the service of the injured vessel" (p. 7).

A similar statement occurs at page 16.

We submit that this statement is erroneous and begs the question presented by the case.

The petitioner did, in effect, maintain an extra boat

(or boats) to handle his work when boats regularly employed were laid up for repairs and did in the maintenance of such spare boat (or boats) and otherwise incur expense to replace the service of the injured vessel.

In the present case the two tugs which were used as substitutes for the "Integrity" were ordinarily operated a single shift of ten hours per day. In order to substitute for the "Integrity" they were operated the requisite number of additional hours per day each overtime, thus furnishing a substitute for the "Integrity" out of their spare and otherwise unused capacity. The situation would have been in no way different if one of these boats had been set aside for use only as a spare and the ordinary work of the petitioner divided between the "Integrity" and the other boat. If this plan had been followed even the United States would admit that the use of the vessel so set aside as a spare boat would come within the doctrine of the spare boat cases and the petitioner would be entitled to compensation for her use.

Yet the situation here is in no degree different. The expense to the petitioner of owning and maintaining three tugboats would be identical whichever plan of operation was adopted, that is whether one boat was set aside as a spare, or whether all three were operated part-time and spare or reserve capacity maintained for use in emergencies when one of the vessels should be disabled by collision or otherwise. The petitioner was under the identical "expense to replace the service of the injured vessel" as were the libellants in the spare boat cases whose authority is recognized by the Government, as well as ourselves.

But it is said that this case is different from the spare boat cases because in those cases the substituted vessel was set aside as a spare while here all three of petitioner's tugs were regularly operated and the substitute was furnished out of the spare and otherwise unused capacity of the other

two. We can see no distinction. As we have pointed out, there was no difference in expense to the petitioner. Moreover, there is no requirement in the spare boat doctrine that the spare boat must be completely idle, except during those periods when she is called upon to operate as a spare. In fact, it appears definitely in some of the decisions that this was not the case. In the case of *The New Haven Steamboat Company* v. *The Mayor, etc.*, 36 Fed. 716 (S. D. N. Y.), as pointed out in our principal brief (p. 9), the spare boat used was a sister boat kept by the libellants—

> "for the purpose, *in part*, as appears from the evidence, of continuing the trips of the line with regularity, in case of accident to one of the regular boats, or during their repair. She was also occasionally let out for excusions, and upon special charters" (p. 717). (Italics ours.)

Similarly in the case of *The Providence*, 98 Fed. 133 (C. C. A. 1), the substituted sister vessel was another boat kept for winter service in the line.

There is nothing in the language or reasoning of the opinions in the other spare boat cases which would indicate that the decision would have been different if it had appeared that the spare boat had been partially employed.

Moreover, as pointed out in our principal brief, the attempted distinction between this case and the spare boat cases on the ground that the petitioner had not definitely formulated and declared a policy of maintaining spare boat capacity for emergencies is arbitrary, insubstantial, impractical and not justified by reason or authority. To say that a man's right to damages is dependent on his state of mind at the time his injury was sustained is to set up an unworkable standard and to put a premium on dishonesty.

In the Government's brief it is said at page 7:

> "An award for demurrage in this case would therefore be more than compensatory, would result

> in the recovery of money which the petitioner has not lost, and would leave him richer than if his vessel had not been injured" (p. 7).

and again at page 17 it is said that an award to the petitioner for demurrage in this case "would be a windfall for petitioner". These statements are in substance a repetition of the rejected arguments made by the respondents in the spare boat cases.

In those cases it was contended by the respondents that inasmuch as the libellants had already incurred the expense of acquiring and maintaining a spare boat the libellants had incurred no additional expense as a result of the collision and could recover nothing for the use of their spare boat.

As was said by the Court in *The Cayuga*:

> "It is quite obvious, that there is neither justice nor equity in allowing to a tort-feasor the benefit of this large outlay made by the libellants to enable them to serve the public and run their ferry without interruption; and yet that is the effect of yielding to the argument that, because such spare boat was already in the libellants' possession, and was used, therefore the libellants sustained no pecuniary loss by the delay. If it be conceded that a just allowance for the necessary cost of another boat, hired at its fair value to perform the service, would be necessary to the indemnity of the libellants, there is no sound reason, I think, for withholding such allowance when the libellants furnish the substituted boat themselves. * * * It is not true that the use of this boat has, in fact or in law, no value." *The Cayuga*, 7 Blatch. 385, Fed. Case No. 2537, affirmed 81 U. S. (14 Wall.) 270, 278.

See also:

> *The Emma Kate Ross*, 50 Fed. 845, 847, 848 (C. C. A. 3rd).

It is asserted in the Government's brief (p. 16) that the petitioner has not shown that there was extra expense to the petitioner in operating the two tugs overtime and that "in overtime cases such as this" the additional cost of overtime operation must be shown, a statement which again begs the issue. There can be no doubt that there was such expense but in petitioner's view of the case it was quite unnecessary to show the amount.

In addition to the expense to the libellants of capital outlay, overhead and depreciation involved in maintaining spare tugboat capacity, and the recognized extra expense of overtime operation, it is an indubitable fact that the operation of the two sister boats of the "Integrity" extra hours involved actual expense to the libellant of additional wear and tear on the vessels. In the nature of things it is practically impossible to estimate actually in dollars and cents this element of cost to the petitioner but this item of expense is none the less real. However, such an estimate is not necessary for under the authorities the petitioner is not limited in its recovery to the actual cost of the substituted service when supplied by itself. The rule of the spare boat cases is that when the owner supplies the spare boat he is entitled to be compensated for the use of that boat on the basis of its market value which, of course, includes not only such more or less indefinite elements of expense but a reasonable profit or compensation for the use of the substituted vessel. The measure of the allowance to the libellant in such cases is:

> "The necessary cost of another boat, hired at its fair value to perform the service." *The Cayuga, supra.*

In other words, the libellant is entitled to the same compensation for the use of his boat as he could obtain by rendering the same service to someone else at market rates, or the same amount which he would have to pay

to someone else to secure similar services of a vessel not owned by himself. Such compensation of course, includes a fair profit in addition to the actual expense. Any other rule would be to allow a tort-feasor, in part at least, the benefit of the petitioner's outlay to avoid interruption of its service in emergencies such as that caused by the disablement of the "Integrity" resulting from the collision with the "Raritan".

The market value of the services lost or supplied is recognized as the true measure of damages in the decision of this Court in *The Potomac,* 105 U. S. 630, 631.

The suggestion that although there was extra wear and tear on the substituted vessels, there was a saving in wear and tear in the "Integrity" while undergoing repairs which should be taken into consideration is without merit. If valid; this would lead to the proposition that in cases where a substitute was hired, the owner could not recover the full amount paid for the substitute but must deduct therefrom an allowance for saving in wear and tear on the injured vessel while under repairs. This is not the rule and we believe no authority can be cited for such a proposition.

The cases cited in the Government's brief, where damages for loss of use have been disallowed, *The Conqueror,* 166 U. S. 110; *The North Star,* 151 Fed. 168 (C. C. A. 2d); *The Winfield S. Cahill,* 258 Fed. 318 (C. C. A. 2d); *Cuyamel Fruit Co.* v. *Nedland,* 19 F. (2d) 489 (C. C. A. 5th); *Newtown Creek Towing Co.* v. *City of New York,* 23 F. (2d) 486 (C. C. A. 2nd) are all cases where damages for loss of use were disallowed either because it appeared that the *vessel damaged* would not have been profitably employed during the period of her layup for repairs, or there was no showing that she would have been. This is quite a different situation from the cases such as the present where there is no doubt but that the vessel damaged would have been employed and a substitute has actually been furnished.

In *The Wolsun*, 14 F. (2d) 371 (C. C. A. 5th), the vessel was under charter and there was no showing that her owner had not received charter hire during the period of repair. As we read *The Glendola*, 47 F. (2d) 206 (C. C. A. 2d), it was not there held that damages could not be allowed for embarrassment of the owner's business in general but that under the circumstances of that case there could be no award since no definite sum could be attributed as damages due to the detention.

We regard the decision in *The Mediana*, 1900 A. C. 113 as clearly supporting the petitioner's right to recovery in this case and as already indicated we differ entirely from the view expressed by the government that there has been a failure on the part of the petitioner in this case to prove any actual loss.

The question presented is whether, because the petitioner's loss and expense in maintaining surplus tugboat capacity had been largely incurred prior to this accident, the Government as a tort-feasor is to be permitted to have the gratuitous benefit of the petitioner's substantial outlay. Our position is that taken by the court in the decision in *The Cayuga, supra*—

> "that there is neither justice nor equity in allowing to a tort-feasor the benefit of this large outlay * * *."

The Amount Awarded.

In the brief for the United States the amount of the award to the petitioner for demurrage is now attacked. The Government did not assign error in the Circuit Court of Appeals on the ground that the amount awarded to the libellant was excessive (Assignments of Error, R. 77). The Circuit Court of Appeals in its opinion commented that—

> "The respondent does not object to the amount fixed as reasonable hire for the supposititious substitute, * * *" (R. 79).

If, however, it is not too late for the Government to raise this question at this time, the answer to the Government's argument is plain. It is argued first that the period for which detention was allowed by the District Court was too long and that demurrage must, in any event, be limited to the number of days specified in certain bids which were tendered for the making of these repairs.

The facts are that bids were obtained from several yards ranging from $25,850.00 to $27,000.00 for the repairs and specifying periods from 30 to 32 days for the completion of the work. These bids were regarded as too high and were rejected under the advice of experts (R. 23). It was decided that the work could be done for considerably less on a day's work basis under supervision of the accounting firm of Alley Eells & Company and the work was given to the Vulcan Iron Works on this basis (R. 24). However, conditions in all shipyards were very crowded at this time (R. 43). There were delays which were unavoidable under the circumstances (R. 40, 44) and the saving in cost of the repairs was much less than was anticipated.

The Government's criticism of the allowance to the petitioner by the District Court is, however, based on hindsight, whereas the fair test to be applied to the libellant's claim is whether or not the libellant acted as a reasonable man should have under the circumstances to minimize the damages. This is a question of fact which was decided favorably to the petitioner both by the Special Commissioner (R. 70) and the District Court (R. 72-74).

The Special Commissioner pointed out that the mode of repair adopted by the petitioner by days' labor is authorized by the decisions and that the judgment of petitioner's experts was not challenged by any expert testimony offered by the Government. He held that petitioner's conduct was not to be judged by hindsight and allowed demurrage for the period of the actual detention (R. 70).

The District Court affirming the Commissioner's report, commented that in view of the fact that at the time of the collision libellant was not entitled to sue the United States there was no ground for attributing, or even suspecting, a motive to increase damages and that the course pursued, based on the advice of experts, was reasonable (R. 72). Dealing specifically with the question of the period for which demurrage was allowed, the Court said:

> "Inasmuch as upon the evidence application of the extract quoted requires approval of the method by which the libellant procured the repairs to be made, it follows necessarily as an incident (reasonably prudent conduct having appeared) that the period during which libellant was deprived of the service of the tug cannot be treated as unduly long" (R. 73-74).

The Circuit Court of Appeals in its view of the case deemed it unnecessary to consider whether the period was unreasonably prolonged (R. 79).

The Government also questions the amount of the allowance to the petitioner which was based on the market value of the services of the "Raritan" or her substitute (R. 28, 70, 73). This rate is now questioned because of the statement elicited from petitioner's witness that it was more economical than hiring outside tugs. This statement, of course, referred to the fact that the petitioner's expense for maintaining spare boat capacity had already been incurred and to hire an outside tug under the circumstances would have been to incur double expense. The rate allowed by the District Court was the market rate and was proper under the decisions we have cited.

The Government has requested, that if the Court is of the opinion that demurrage should be allowed, the case be remanded with directions for further proceedings to assess the damages. Similarly, we would request that if

the Court is of the opinion that the theory on which damages for detention were allowed by the District Court was wrong but that an allowance based on a different theory or measure of damages might be justified, that the case be remanded with directions for further proceedings for the assessment of the damages.

Respectfully submitted,

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